No. 86-1024 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CONFERENCE OF STATE BANK SUPERVISORS, FLORIDA DEPARTMENT OF BANKING AND FINANCE, FLORIDA BANKERS ASSOCIATION, and SUN BANK/PALM BEACH,

Petitioners,

—against—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM and U.S. TRUST CORPORATION,

Respondents.

MEMORANDUM OF U.S. TRUST CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, in light of *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681 (1986), the United States Court of Appeals for the Eleventh Circuit correctly decided that an entity that accepts demand deposits but does not make commercial loans is not a "bank" within the meaning of Section 2(c) of the Bank Holding Company Act.

Whether, under *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the United States Court of Appeals for the Eleventh Circuit correctly decided that an entity that is not a "bank," within the meaning of Section 2(c) of the Bank Holding Company Act, is not subject to Section 3(d) (the Douglas Amendment) of the Bank Holding Company Act.

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MEMORANDUM OF U.S. TRUST CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

U.S Trust Corporation ("U.S. Trust") submits this memorandum in opposition to the petition for a writ of certiorari (the "Petition") filed by the Conference of State Bank Supervisors, the Florida Bankers Association, the Florida Department of Banking and Finance, and Sun Bank/Palm Beach (collectively, "Petitioners").

OPINIONS BELOW

The two opinions of the Eleventh Circuit Court of Appeals in this case are reported as *Florida Department of Banking and Finance v. Board of Governors*, 760 F.2d 1135 (11th Cir. 1985) ("*Florida Department I*") and *Florida Department of Banking and Finance v. Board of Governors*, 800 F.2d 1534 (11th Cir. 1986) ("*Florida Department II*"), and appear in the Appendix to Petitioners' Petition for Writ of Certiorari to the Court of Appeals for the Eleventh Circuit (the "Appendix") beginning at 10a and 46a, respectively. This Court's prior opinion in this case is reported at 106 S. Ct. 875 and appears in the Appendix at 45a.[1] The order of the Federal Reserve Board is reported at 70 Fed. Res. Bull. 371, appears beginning at App. 1a, and is cited herein as "Order, 70 Fed. Res. Bull. at ___ (App. at ___)."

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix to the Petition at pp. 20-21 and are cited herein as "12 U.S.C. ___ § ___ (Pet. at ___)."

STATEMENT OF THE CASE

A. U.S. Trust

U.S. Trust is a New York bank holding company, whose sole bank subsidiary is located in New York, New York. In November 1981, both the Florida Department of Banking and Finance and the Federal Reserve Bank of New York authorized U.S. Trust to establish a Florida nondepository trust subsidiary. Until May 1984, that Florida subsidiary, U.S. Trust Company of Florida, N.A. ("Trust Company"), was operated solely as a nondepository trust company, providing fiduciary, investment advisory and custody services for local customers.

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1 The opinions below and this Court's prior order, as reprinted in the Appendix, are cited herein as "[case citation] (App. at ___)."

B. The Board's Order

On March 23, 1984, the Board of Governors of the Federal Reserve System (the "Board") issued an order, 70 Fed. Res. Bull. 371 (1984) (the "Order"), approving U.S. Trust's application, pursuant to Section 4(c)(8), 12 U.S.C. §1843(c)(8) ("Section 4(c)(8)"), of the Bank Holding Company (the "Act"), to expand Trust Company's nonbanking activities to include the acceptance of time and demand deposits and the making of consumer loans. This approval was subject to conditions which, among other things, prohibited Trust Company from making any commercial loans.[2] The Board ruled that it was required to approve Trust Company's proposed expansion under the Act, which expressly defines a "bank" to be an institution that:

> (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. . . .

12 U.S.C. § 1841(c) ("Section 2(c)"), cited at App. at 3a.

Because Trust Company would not make commercial loans, the Board concluded that it would not be a "bank" and that U.S. Trust's ownership of Trust Company could not therefore implicate Section 3(d) of the Act, 12 U.S.C. § 3(d) (the "Douglas Amendment"), which regulates interstate "bank" acquisitions. Applying the statutory criteria set forth in Section 4(c)(8) of the Act, the Board concluded that Trust Company's expanded activities would be appropriate non-banking activities and would not result in any "conflicts of interest, unsound banking practices or other adverse effects." 70 Fed. Res. Bull. at 373 (App. at 6a).

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2 Specifically, those conditions were:

> (1) Applicant will not operate Trust Company's demand deposit accepting activities in tandem with any other subsidiary or financial institution;
>
> (2) Applicant will not link in any way the demand deposit and commercial lending services that define a bank under the Act; and
>
> (3) Trust Company will not engage in any transactions with affiliates, other than the payment of dividends to Applicant or the infusion of capital by Applicant into Trust Company, without the Board's approval.

70 Fed. Res. Bull. at 373 (App. at 7a).

After issuance of the Board's Order, U.S. Trust converted Trust Company into a chartered national association. The United States Comptroller of the Currency approved this conversion on the express condition that Trust Company not make commercial loans.

Since May 1984, Trust Company has provided fiduciary, investment advisory, and custody services, and, as authorized by the Board and the Comptroller of the Currency, has taken demand deposit and made non-commercial loans.

C. Prior Decisions of this Court and of the Court of Appeals for the Eleventh Circuit

Petitioners appealed the Board's Order to the Court of Appeals for the Eleventh Circuit. On May 20, 1985, the Court of Appeals issued an opinion reversing the Board's Order. *Florida Department I*. The Court of Appeals concluded that Trust Company should be deemed a "bank" under the Act—even though it did not satisfy the Act's statutory definition of "bank" because it did not make commercial loans.

U.S. Trust thereafter petitioned this Court for a writ of certiorari. This Court granted the petition and vacated the Court of Appeals' ruling. *U.S. Trust Corporation v. Board of Governors*, 106 S. Ct. 875 (1986) (App. at 45a). This Court then remanded the case to the Court of Appeals for reconsideration in light of this Court's opinion in *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 106 S. Ct. 681 (1986) ("*Dimension*").[3]

On remand, the Court of Appeals concluded that it was required by the Supreme Court's decision in *Dimension* to affirm the Order. *Florida Department II*. The Court of Appeals concluded:

> Because U.S. Trust's Florida subsidiary will not make commercial loans, it is not a "bank" within the meaning of the Act. If, as *Dimension* holds, the Federal Reserve Board is without regulatory jurisdiction to regulate

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3 The *Dimension* opinion is reprinted in the Appendix beginning at 30a and is cited herein as "*Dimension*, 106 S. Ct. at ___ (App. at ___)."

> nonbank banks as "banks" under the Act, then it is without regulatory jurisdiction to prevent the interstate proliferation of nonbank banks under the Douglas Amendment.

Florida Department II, 800 F.2d at 1536-37 (App. at 51a).

REASONS FOR DENYING THE WRIT

This Court has already considered and resolved the issues raised by the present Petition. During its 1986 Term, this Court decided *Dimension*, and then reversed and remanded this case to the Eleventh Circuit for reconsideration in light thereof. On remand, in *Florida Department II*, the Eleventh Circuit followed *Dimension* and concluded that U.S. Trust's Florida subsidiary is not a "bank" within the meaning of the Act.

Petitioners presently contend that the Court should again review this case. They argue that Section 3(d) of the Act (the "Douglas Amendment") prohibits U.S. Trust's interstate ownership of Trust Company.

Petitioners are really asking this Court to reconsider issues that it has recently decided. This Court has already held that Congress specifically defined the term "bank" for purposes of the Act and that neither the courts nor the Board can expand that definition to reach an entity that does not make commercial loans. *See Dimension*. This Court has also held, in an opinion the Petitioners do not even cite, that the Douglas Amendment does not apply to an entity that is not a "bank" under the Act. *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980) ("*Lewis*").

The petition for writ of certiorari should therefore be denied.

I

UNDER THIS COURT'S *DIMENSION* DECISION, TRUST COMPANY IS NOT A "BANK"

Section 2(c) of the Act specifically defines a "bank" to be an entity that:

> (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans . . .

12 U.S.C. § 1841(c) (Pet. at 20). Last term, this Court ordered the Court of Appeals to reconsider this case in light of *Dimension*, in which this Court interpreted the "bank" definition. Upon remand, the Eleventh Circuit correctly concluded that Trust Company is not a "bank."

A. *Dimension* Holds that the Act's "Bank" Definition Cannot Be Expanded By Judicial or Administrative Interpretation

In *Dimension*, this Court's unanimously invalidated regulations[4] by which the Board attempted to extend its authority under the Act to "nonbank banks" — entities that are not within the Act's "bank" definition, but that the Board considered to be the "functional equivalent" of banks. This Court held that Congress had enacted a clear and specific definition of "bank" and that the Board could not rely upon its own view of Congressional "purposes" to expand the definition to include nonbank banks. The Court reasoned that:

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4 The Board had promulgated rules to redefine "bank" to include institutions (i) that accepted deposits payable in demand "as a matter of practice" (rather than by "legal right" as prescribed by the Act) and (ii) that made any loan other than a loan to an individual for personal, family, household or charitable purposes, including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments" (rather than "commercial loans" prescribed by the Act). 12 C.F.R. § 225.2(a)(1)(1985).

> The statute by its terms . . . exempts from regulation *all* institutions that do not engage in the business of making commercial loans. The choice of this . . . language demonstrates that . . . Congress intended to exempt the class of institutions not making commercial loans. Furthermore, the legislative history supports this plain reading of the statute.

106 S. Ct. at 687 (App. at 40a) (emphasis in original).

This Court's *Dimension* opinion concluded that the Congressional purpose behind the Act had to be determined in the first instance "with reference to the plain language of the statute itself." 106 S. Ct. at 688-89 (App. at 42a). Indeed, this Court concluded that:

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, *the final language of the legislation may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.*

106 S. Ct. at 689 (App. at 42a-43a) (emphasis added).[5]

B. Under *Dimension*, the "Bank" Definition Determines the Scope of all Provisions of the Act

Despite the Court's unequivocal holding in *Dimension*, Petitioners now argue that the statutory "bank" definition cannot apply to

5 By contrast, in *Cass v. United States*, 417 U.S. 72 (1974), a case cited by Petitioners, the Court looked to the legislative history of 10 U.S.C. § 687(a) because it found the statutory language to be ambiguous.

the Douglas Amendment because such application would defeat Congress's purpose in enacting that Amendment. They argue that the term "bank" or, alternatively, the term "additional bank" must therefore have a different meaning for purposes of the Douglas Amendment. However, as the *Dimension* opinion expressly concludes, Congress's "bank" definition was specifically intended to determine the scope of the entire Act — including, of course, the Douglas Amendment.

The Act's "bank" definition clearly applies to the entire Act, including the Douglas Amendment.[6] In 1970, Congress amended the definition to include only depository entities that make commercial loans. In *Dimension*, the Court reviewed the legislative history of this amendment and concluded that it was intended to have general applicability and to narrow the scope of the entire Act.[7] The Court wrote:

> The statute by its terms . . . exempts from regulation *all* institutions that do not engage in the business of making commercial loans. The choice of this general language demonstrates that, although the legislation may have been prompted by the needs of one institution, *Congress intended to exempt the class of institutions not making commercial loans*. Furthermore, the legislative history supports this plain reading of the statute.

106 S. Ct. at 687 (App. at 40a) (emphasis added).

General rules of statutory construction also support this conclusion. As the Eleventh Circuit itself reasoned in its opinion on remand in this case:

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6 The "bank" definition appears in the definitions section at the beginning of Chapter 17 of Title 12 of the United States Code. That section is obviously intended to provide the definitions for the Act, including the Douglas Amendment.

7 The Board had argued that this amendment was a technical amendment intended to exclude only one institution (the Boston Safe Deposit & Trust Co.) from the Act. The Court rejected this argument, which it called a "revisionist view of the purpose of the 'commercial loan' provision. . . ." 106 S. Ct. at 687 (App. at 40a).

> It is an elementary precept of statutory construction that the definition of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute. 1A Sutherland, Sutherland on Statutory Construction § 20.08 at 88 (4th ed. 1985). Thus, a depository institution which is not a bank as defined in § 1841(c) is similarly not a bank for purposes of the Douglas Amendment, § 1842(d)(1). *If it were a bank, we would be faced with the anomaly of "bank" meaning one thing in one section of the Act and another thing in another.*

Florida Department II, 800 F.2d at 1536 (App. at 51a) (emphasis added).

In support of their argument, Petitioners cite *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932) (Petition at 9), as an instance in which this Court has interpreted the same term to have different meanings in different provisions of the same statute. In *Atlantic Cleaners*, the Court interpreted the term "trade or commerce" as used in the Sherman Antitrust Act. The Sherman Act, however, contained no statutory definition of "trade or commerce." Thus, the Court was not presented with a specific definition enacted by Congress. By contrast, Congress did include a very specific "bank" definition in the Bank Holding Company Act[8]

In addition, in *Atlantic Cleaners*, the Court only held that the term "trade or commerce" had a broader meaning for the purposes of Section 3 of the Sherman Act than for the purposes of Section 1. The Court based this holding on its conclusion that, in passing Sections 1 and 3, Congress had intended to exercise all the power it possessed and that Congress had been delegated broader powers to regulate interstate commerce (governed by Section 3) than to regulate commerce involving the District of Columbia, a Territory, or a foreign nation (governed by Section 1). The Court reasoned that "in

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8 Similarly, in two other cases cited by Petitioners, the term at issue was not defined in any statutory provision. *See District of Columbia v. Carter*, 409 U.S. 418 (1973); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84 (1934).

passing § 1, Congress could exercise only the power conferred by the commerce clause; but, in passing § 3, it had unlimited power, except as restricted by other provisions of the Constitution." 286 U.S. at 435.[9] This distinction is not applicable to the present case.

In the present case, Congress enacted a single "bank" definition to determine the scope of the Act and did not rely on different delegated powers in enacting that definition and the Douglas Amendment. As the term "bank" was correctly interpreted by this Court in *Dimension*, U.S. Trust's Florida subsidiary is simply not a "bank" and is therefore not subject to the Douglas Amendment.

C. *Dimension* Holds That Only Congress Can Modify the "Bank" Definition

In *Dimension*, the Court concluded that, because Congress had enacted a specific definition of "bank", only Congress could change that definition. Chief Justice Burger wrote:

> [i]f the Bank Holding Company [Act] falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address.

106 S. Ct. at 689 (App. at 43a-44a). Recognizing the validity of this holding, the Eleventh Circuit concluded that "[i]t is Congress . . . that must now decide whether it wishes to shepherd the nonbank banks inside the regulatory pale." *Florida Department II*, 800 F.2d at 1537 (App. at 52a).[10]

9 Petitioners also mistakenly cite *District of Columbia v. Carter*, 409 U.S. 418 (1973), in which the Court held that the District of Columbia is included within "every State and Territory" as employed in 42 U.S.C. § 1982, but is not a "State or Territory" for the purposes of 42 U.S.C. § 1983. As in *Atlantic Cleaners*, the two statutory provisions were passed pursuant to different powers which have been constitutionally delegated to Congress. Indeed, Section 1982 was passed to implement the Thirteenth Amendment's absolute bar to all racial discrimination, whereas Section 1983 was passed pursuant to the Fourteenth Amendment's prohibition against deprivations of rights by the States.

10 The subsequent history of a case cited by petitioners, *Farmers Resevoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949), also illustrates Congress's power to change statutory language, if it wishes. After the Court held that the employees of a mutual irrigation company were not exempted from the Fair Labor

In fact, legislation which would redefine "bank" for the purposes of the Act has been introduced in Congress (but ultimately not enacted) every year since 1983. *See, e.g.*, H.R. 20, 99th Cong., 1st Sess. (1985); H.R. 5916, 98th Cong., 2d Sess. (1984); S. 2181, 98th Cong., 1st Sess. (1983). Indeed, such legislation is presently before the Senate. S. 790, 100th Cong., 1st Sess. § 101(a) (1986).

II

PETITIONERS DISTORT LEGISLATIVE HISTORY IN AN ATTEMPT TO AVOID THE *DIMENSION* DECISION

To avoid the *Dimension* decision, Petitioners argue that the legislative histories of the Douglas Amendment and the McFadden Act (a statute with no application to this case[11]) indicate that a bank holding company should not be permitted to own a deposit-taking nonbank bank in a second state. Petitioners simply ignore the *relevant* legislative history—that of the Act's "bank" definition. Having fully considered the legislative history of Section 2(c) in *Dimension*, the Court concluded that it clearly shows that Congress did not intend to regulate an entity as a "bank" unless it both receives demand deposits *and* makes commercial loans.

Footnote 10 continues:

Standards Act (the "FLS Act"), Congress amended the FLS Act to reflect its intention to exempt such persons from the Act. *See* 29 U.S.C. § 213(a)(6). *See also* 29 U.S.C. § 251(a) ("The Congress hereby finds that the [FLS Act] has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers . . .").

11 The McFadden Act, 12 U.S.C. § 36, is not at issue here. It regulates branch-banking by a single bank.

As originally enacted in 1956, Section 2(c) of the Act defined a "bank" to be any institution with a federal or state banking charter. 106 S. Ct. at 684. After the proposed Act had been reported out of the Senate and House Banking and Currency Committees, Senator Douglas introduced the Douglas Amendment. That Amendment principally reflected Congress' concern with preventing the development of any monopoly over commercial lending. Senator Douglas's remarks, which constitute the principal legislative history of the Douglas Amendment,[12] show that Congress enacted the amendment to avoid the monopolization of commercial credit that it perceived to have developed in Britain, Germany and other European countries as a result of a few banks' abilities to allocate commercial credit.[13]

In his remarks about the Douglas Amendment, Senator Douglas expressed no concern for depository institutions that did not make commercial loans. He certainly did not propose that "bank" have a different meaning for the Douglas Amendment than for other provisions of the Act.

In 1956, Congress knew that some existing institutions that took deposits—"industrial" banks (also known as "Morris Plan" banks)[14]—did not make commercial loans. The 1956 legislative his-

12 As this Court held in *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 169-70 (1985):

> [The Douglas Amendment's] entire legislative history is confined to the Senate debate. In such circumstances, the comments of individual legislators carry substantial weight, especially when they reflect a consensus as to the meaning and objectives of the proposed legislation though not necessarily the wisdom of that legislation.

13 102 Cong. Rec. 6857 (1956) (for instance, Douglas stated, "[f]or he who controls the credit of a country controls the industry of that country and, ultimately, the political life of the Nation as well"). In addition, Senator Douglas expressed concern that such a monopoly over commercial credit might, as it had in Britain and Germany, allow nonbanking entities that were affiliated with banks to develop unfair commercial advantages because they had substantially greater access to commercial loans than their competitors had. *Id.*

14 These industrial or Morris Plan banks made consumer, but not commercial loans. They also received deposits in a number of forms determined by state law. *See generally* American Financial Services Association, Industrial Banks as Thrift Institutions (1983).

tory shows that Congress did not intend these institutions to be within the scope of the Act's definition of "bank" or to be governed by the Douglas Amendment. *E.g.*, 102 Cong. Rec. 6957 (1956) (statement of Sen. Robertson); 101 Cong. Rec. 3823 (1955) (statement of Rep. Spence). *See also Applicability of the Bank Holding Company Act to Industrial Banks*, 49 Fed. Res. Bull. 166 (1963). Indeed, in 1956, Congress was aware of instances in which industrial banks were owned on an interstate basis.[15] In sum, this 1956 legislative history shows that Congress did not intend the Douglas Amendment to govern the interstate ownership of all depository institutions.

In 1966, Congress concluded that the Act's "bank" definition was too broad. Congress amended the definition to regulate only institutions that "accept deposits that the depositor has a legal right to withdraw on demand."[16] The Court concluded in *Dimension* that

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15 *Bank Holding Legislation: Hearings on S.76 and S.1118 Before the Senate Comm. on Banking and Currency*, 83rd Cong., 1st Sess. 328-33 (1953) (statement of E. Huntington, President, Morris Plan Corp. of America) (Financial General Corporation, the parent company of the "Morris Plan System," had a controlling interest in 18 industrial banks in various cities throughout the country); *id.* at 631-55 (statement of Walter S. Burtelow, Exec. Vice President, General Contract Corp.) (General Contract Corp. of St. Louis had controlling interest in industrial banks located in at least 3 states); R.J. Saulnier, *Industrial Banking Companies and Their Credit Practices*, 13, 23-25 (1940).

16 Arguing from the absence of any evidence one way or the other as to whether Congress intended the Douglas Amendment to be affected by the 1970 amendments, Petitioners essentially contend that this Court should ignore that amendment to Section 2(c). Petitioners base their argument on their observation that Congress intended its 1966 amendment of the "bank" definition to confirm that all deposit-taking institutions would be subject to the Douglas Amendment. (Petition at 18). As Petitioners correctly point out, *id.*, however, the Senate Committee report on the 1970 amendments stated that the amendments to Section 2(c) would "exclude institutions that are not engaged in the business of making commercial loans from the definition of 'bank.' " S. Rep. No. 1084, 91st Cong., 2d Sess. 24 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5519 at 5541, *quoted in Dimension*, 106 S. Ct. at 687-88 (App. at 41a).

this amendment was intended to limit the scope of the Act.[17] *See* 106 S. Ct. at 685 (App. at 36a).

By the late 1960's, a large number of one-bank bank holding companies (not then subject to the Act) had developed. In 1970, Congress amended the Act to include these one-bank holding companies.[18] This amendment significantly expanded the number of regulated bank holding companies within the Act.

As a part of its 1970 amendments to the Act, Congress narrowed the "bank" definition to exclude institutions that did not make commercial loans. This narrowing was intended to exclude institutions that did not present the type of harm (the undue control of commercial lending) that concerned Congress.[19] In *Dimension*, this Court concluded that this 1970 amendment was intended to limit the Act's scope to commercial lenders. The Court stated:

> The 1966 definition proved unsatisfactory because it too included within the definition of "bank" institutions that did not pose significant dangers to the banking system. Because one of the primary purposes of the Act was to "restrain undue concentration of . . . commercial credit," it made little sense to regulate institutions that did not, in fact, engage in the business of making com-

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17 *See e.g.*, S. Rep. No. 1179, 89th Cong., 2d Sess. 7, *reprinted in* 1966 U.S. Code Cong. & Admin. News 2385, 2391. ("The purpose of the [A]ct was to restrain undue concentration of control of commercial bank credit, and to prevent abuse by a holding company of its control over this type of credit for the benefit of its nonbanking subsidiaries").

18 *E.g.*, *Hearings on H.R. 6778 Before the House Comm. on Banking and Currency*, 91st Cong., 1st Sess. 200-01 (1969) (comments of William McChesney Martin, Jr., Chairman, Board of Governors Federal Reserve System); *id.* at 196-97 (comments of William McChesney Martin, Jr., Chairman, Board of Governors, Federal Reserve System), *quoted in* S. Rep. No. 1084, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5519, 5521-22.

19 *See*, S. Rep. No. 1084, 91st Cong., 2d Sess. 24, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5519, 5541 (the 1970 amendments to the bank definition were intended to implement Congress's 1966 intent to exclude those "institutions not engaged in commercial banking, since the purpose of the act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit").

> mercial loans. *Congress accordingly amended the definition, excluding all institutions that did not "engag[e] in the business of making commercial loans."*

106 S. Ct. at 685 (App. at 34a) (emphasis added; citations omitted).

III

THIS COURT HAS HELD THAT THE DOUGLAS AMENDMENT GOVERNS ONLY "BANK" ACQUISITIONS

Petitioners argue alternatively (i) that, despite *Dimension*, the term "bank" somehow has a different meaning for the Douglas Amendment than for the rest of the Act or (ii) that the threshold term for the Douglas Amendment is "additional bank" rather than "bank." Petitioners make both of these arguments without even citing this Court's *Lewis* decision. In *Lewis*, this Court held that the Douglas Amendment governs only "bank" acquisitions and rejected the argument that the Douglas Amendment regulated nonbanking activities.[20]

In *Lewis*, the Court held unconstitutional two Florida statutes that sought to prohibit out-of-state bank holding companies from owning nonbanking entities in Florida.[21] The Court concluded that the Act preempted Florida from prohibiting the interstate acquisition of a nonbank entity. The Court specifically held that the Douglas Amendment did not apply to such nonbank entities, stating:

> . . .the structure of the Act reveals that § 3(d) applies only to holding company acquisitions of *banks*. Nonbanking activities are regulated separately in § 4,

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20 Petitioners' failure to cite *Lewis* is particularly unjustifiable given that two of them — Florida Bankers Association and Conference of State Board Supervisors — appeared *amicus curiae* in *Lewis*, 447 U.S. at 29 n, and the counsel representing the Conference of State Board Supervisors here argued the case to the Court, id. at 29.

21 In *Lewis*, a New York bank holding company provided investment advisory services in Florida pursuant to the same statutory provision (Section 4(c)(8)) under which the Board of Governors of the Federal Reserve System approved the nonbanking activities of Trust Company which are at issue here.

> which does not contain a parallel provision. Even if § 3(d) could be interpreted to authorize additional state regulation, ordinary canons of interpretation thus would lead to the inference that restraints so authorized could apply only to a holding company's *banking* activities.

447 U.S. at 47 (emphasis added; footnote omitted).

Conclusion

For the above reasons, U.S. Trust respectfully submits that this Court should deny the petition for a writ of certiori of the Conference of State Bank Supervisors, Florida Department of Banking and Finance, and the Sun Bank/Palm Beach.

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March 27, 1987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Memorandum of U.S. Trust Corporation have been served by Federal Express, on this 27th day of March, 1987, to:

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